

May 5, 2014

Kyle Jones, Special Investigator
Government, Public Interest, and Law Enforcement Liaison
Sacramento Enforcement Bureau of Real Estate
1651 Exposition Blvd.
Sacramento, CA 95815

Re: Your Request for Advice
Our File No. A-14-082

Dear Mr. Jones:

This letter responds to your request for advice regarding “revolving door” provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Political Reform Act, such as the post-employment provisions of Public Contract Code Section 10411.

QUESTION

Once you leave the California Bureau of Real Estate (BRE), may you representing licensees in administrative hearings (other than cases you investigated) where the BRE is pursuing the discipline or revocation of a real estate license?

CONCLUSION

You are not prohibited under the Act from representing licensees in administrative hearings (other than cases you investigated). Any other communications and appearances to influence administrative or legislative action, or involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property, would be subject to the one-year ban.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are currently a non peace officer Special Investigator for the BRE. You have never represented the Bureau as a student attorney or legal intern. You will be taking the Bar exam in July to become an attorney.

You are considering representing licensees in administrative hearings (other than cases you investigated) where the Bureau is pursuing the discipline or revocation of a real estate license. You have asked whether you could represent these clients before your agency once you leave state service.

ANALYSIS

Officials who leave state service are subject to two types of restrictions under the Act.² The first is a permanent ban, and the second is a one-year prohibition.

Permanent Ban on “Switching Sides”

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit former state administrative officials *from advising or representing* any person for compensation in any judicial or other proceeding in which the official participated while in state service. (Sections 87401 and 87402.) Specifically, Section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

² Please note, the Act also places a prohibition on some of your activities before you leave state service. For example, all public officials, leaving governmental service are also subject to restrictions when negotiating prospective employment. Under Section 87407 and Regulation 18747, prior to separation from government service, a public official is prohibited from making, participating in making, or influencing a “governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.” In addition, the Act’s conflict-of-interest provisions prohibit an official from making, participating in making, or influencing any governmental decision with a reasonably foreseeable material financial effect on the source of promised income. (See Sections 87100, et seq. and Regulations 18700, et seq.)

Section 87402 provides:

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

The prohibitions of Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

“(1) The official has permanently left or is on a leave of absence from, as defined in Regulation 18746.4(a), any particular state office or employment.

“(2) The official is compensated, or is promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. For purposes of Section 87401 and 87402, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not considered compensation.

“(3) The official makes an appearance or communication, or aids, advises, counsels, or assists in representing another person, other than the State of California, in making an appearance or communication, before any officer or employee of any state administrative agency for the purpose of influencing, as defined in Regulation 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in Regulation 18202, subdivisions (a)(1)-(a)(7).

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in Regulations 18702.1-18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. A supervisor is deemed to have participated in any proceeding that was “pending before,” as defined in subdivision (b) of Regulation 18438.2, the official’s agency and that was under his or her supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

“(A) The supervisor’s duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a

supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.

“(B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.

“(C) The supervisor reviews, discusses, or authorizes any action in the proceeding.

“(D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

“(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.” (Regulation 18741.1.)

“ ‘State administrative official’ means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.” (Section 87400(b).) As a Special Investigator at the BRE, you are a former state administrative official for purposes of the permanent ban. (Section 87400(b).)

Therefore, the permanent ban restricts your activities in the private sector. In addition, Section 87402 prohibits former state administrative officials from being paid to “aid, advise, counsel, consult or assist in representing” any other person in any proceeding in which the official would be prohibited from appearing under Section 87401.

Please note that the permanent ban only applies to “judicial, quasi-judicial or other proceedings” in which you participated³ on behalf of the BRE. A “judicial, quasi-judicial or other proceeding” is any proceeding, application, request for a ruling or other determination, contract, claim, controversy, *investigation*, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency. (Section 87400(c), emphasis added.)

You have stated that you were a special investigator at BRE. Investigations in which you participated are “judicial, quasi-judicial or other proceedings” and under the permanent ban, you

³ “‘Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.” (Section 87400(d).)

may not for compensation assist or represent any person regarding any such investigation that was pending before your former agency and in which you participated during your tenure.

The permanent ban applies throughout the duration of any proceeding in which you participated. *It does not prohibit you from representing a client in any new proceeding* although the client may have been a party to a previous proceeding in which you participated, provided the one-year ban does not apply, as discussed below.

One-Year Ban

In addition to the permanent ban, the Act prohibits for a year a former officer of a state administrative agency from being paid to communicate with or appear before his or her former agency to influence specified actions. Section 87406 specifically provides:

“No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers’ Compensation Appeals Board.”

As a former employee of BRE, you are subject to the one-year ban. Thus, for one year after leaving state service, you may not represent any person by appearing before or communicating with any BRE officer or employee to influence administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

You have asked specifically about representing licensees in administrative hearings (other than cases you investigated) where the BRE is pursuing the discipline *or* revocation of a real estate license. While, Section 87406(d)(1) generally applies only to communications relating to administrative or legislative actions, and not to judicial or quasi-judicial agency

actions, the statute explicitly covers “license revocation” proceedings and therefore you would be prohibited from participating in license revocation cases while the one-year ban applies.⁴

However, Section 87406 expressly excludes appearances before an Administrative Law Judge from the general prohibition against appearances before an individual’s former agency. (See Section 87406(d) [“For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers’ Compensation Appeals Board”].) Moreover, we have construed this exception to extend to appearances or communications in the administrative hearing and prehearing communications interconnected with the hearing appearance. (*Baxter* Advice Letter, No. I-12-119.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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⁴ Other types of quasi-judicial actions are not included in the prohibition. For example, in the *Ordos* Advice Letter, No. A-95-052, we advised that the one-year ban did not prohibit a former executive director of the Commission from appearing before the agency regarding an enforcement action. An FPPC enforcement proceeding does not fit within the definitions of “legislative action” or “administrative action” as defined in the Act, nor is it an action involving a permit, license, grant or contract, or the sale or purchase of goods or property.